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JUN 20 1957
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 No. ~~1022~~ ~~No. 1023~~ 134

PAUL L. WILLITS, et al.,
Appellants,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee,

PHILADELPHIA ELECTRIC COMPANY,
Intervening Appellee

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

MOTION TO DISMISS APPEAL

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Supreme Court of the United States

OCTOBER TERM, 1956 No. 1023

Paul L. Willits, et al.,
Appellants,

v.

Pennsylvania Public Utility Commission,
Appellee,

Philadelphia Electric Company,
Intervening Appellee.

MOTION TO DISMISS APPEAL.

Philadelphia Electric Company, intervening appellee, moves that the appeal herein be dismissed on the grounds that the federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on.

STATEMENT OF THE CASE.

This is an appeal from an order of the Supreme Court of Pennsylvania entered on February 28, 1957, denying appellants' petition for allowance of an appeal from a judgment of the Superior Court of Pennsylvania.

Appellants had appealed to the Superior Court of Pennsylvania from various orders of the Pennsylvania Public Utility Commission approving applications of the

Philadelphia Electric Company to exercise, under the Act of May 21, 1921, P. L. 1057, 15 P. S. 1182, the right of eminent domain to acquire rights of way for the construction, operation and maintenance of a line for the transmission of electricity (Bradford-Chichester Transmission Line). The orders of the Public Utility Commission had not passed upon any federal questions.

In an opinion dated December 28, 1956, the Superior Court affirmed the orders of the Public Utility Commission. The Superior Court did not pass upon any federal questions. As heretofore indicated, the Supreme Court of Pennsylvania, in its *Per Curiam* order of February 28, 1957, denied appellants' petition for allowance of an appeal.

On April 8, 1957, the Supreme Court of Pennsylvania entered a *Per Curiam* order denying appellants' petition for allowance of supersedeas, and on May 2, 1957, appellants' application for a stay was denied by this Honorable Court.

ARGUMENT.

The opinion of the Superior Court of Pennsylvania (Jurisdictional Statement, P. 24) shows clearly that the Superior Court did not pass upon any federal questions in the proceedings below. It is equally clear why the court did not pass upon any federal questions. Rule 34 of the Rules of the Superior Court, referring to the contents of briefs on appeal, provides as follows:

> "Rule 34. The statement of the questions involved must state the question or questions in the briefest and most general terms, without names, dates, amounts or particulars of any kind. It should not ordinarily exceed fifteen lines, must never exceed one page, and must always be printed on the first page of the Brief, without any other matter appearing thereon. *This rule is to be considered in the highest degree manda-*

tory, admitting of no exception; ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby." (Emphasis supplied.)

In appellants' Consolidated Brief before the Superior Court, they made no attempt to raise any federal questions in their Statement of Questions Involved, which was as follows:

"STATEMENT OF QUESTIONS INVOLVED

"1. Is the appropriation of that land in excess of a fifty foot strip as proposed by the Philadelphia Electric Company necessary within the meaning of the Act of Assembly?

"2. Is the equipment proposed to be used by the Philadelphia Electric Company in transmitting power necessary within the meaning of the Act of Assembly?

"3. Is that land in excess of the fifty foot strip to be appropriated by the Philadelphia Electric Company for a public use?

"4. Did the Commission err in failing to pass upon the necessity of constructing an overhead line and the appropriation of the excessive amount of land?"

In appellants' Petition in Appeal to the Superior Court one of the assignments of error (Jurisdictional Statement, P. 13-14, No. 12) complained that the Public Utility Commission had disregarded testimony of appellants allegedly proving that the construction of the transmission line as proposed "would violate the petitioner's rights as guaranteed by the Constitution of the United States." However, such vague allusions to "the Constitution of the United States," without further specificity, do not properly raise a federal question. *Harding* v. *Illinois*, 196 U. S. 78, 88; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238; *Herndon* v. *Georgia*, 295 U. S. 441.

"A question not raised in nor considered by the tribunal below will be ignored on appeal; it must also be ignored if not included in any assignment of error." *Borough of Middletown* v. *Pennsylvania Public Utility Commission*, 143 Pa. Superior Ct. 444. And the proper method of raising the federal question is determined by State practice. *Central Union Co.* v. *Edwardville*, 269 U. S. 190; *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447; *Parker* v. *Illinois*, 333 U. S. 571.

It is evident, therefore, that when none of the tribunals below passed upon any federal questions it was for the reason that appellants had failed timely and properly to raise any such questions. When the federal questions are not timely and properly raised in the state court and that court is completely silent on such questions, this Honorable Court assumes the silence to be due to the procedural deficiency. *Bailey* v. *Anderson*, 326 U. S. 203.

Appellants' attempt to show that in their Petition for Appeal to the Supreme Court of Pennsylvania there was included an assignment of error to the effect that "if the Act of 1921 (Act of 1889 as amended), 15 P. S. 1181 permits the taking of land in this manner then the Act is unconstitutional in that it violates the 14th Amendment of the United States Constitution . . ." (Jurisdictional Statement, P. 12). Apart from the merits of the question, it is clear that, as previously shown, it came too late, having been neither raised before nor passed upon by the Superior Court. Furthermore, appellants' attempt to show, by citations to their briefs in the proceedings below, that federal questions were properly and timely raised is without merit, since briefs before the state courts cannot be used to establish that a federal question was raised. *Live Oak Association* v. *Railroad Commission*, 269 U. S. 354, 357-358; *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54.

CONCLUSION.

For the foregoing reasons the appeal herein should be dismissed on the grounds that the federal questions sought to be reviewed were neither timely nor properly raised, nor expressly passed on by the State Courts.

Respectfully submitted,

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